

## 1. Context of the proposal

In 2008, the Council adopted a Common Position (2008/944/CFSP) establishing a set of common criteria against which the Member States are obliged to check national licences for arms exports to third countries to prevent internal repression, international aggression and regional instability (Common Position 2008/944/CFSP, para 4). Also, the EU and all its Member States ratified the Arms Trade Treaty (ATT) in 2014 pledging to establish the highest possible international common standards for regulation of the international trade in arms to contribute to international and regional peace, security and stability and thereby reducing human suffering (Article 1 ATT).

The EU and its Member States have committed themselves to a responsible arms export policy. However, the common criteria, which the Common Position introduced, are currently interpreted differently by the Member States. As a result, arms produced in the EU continuously end up in conflicts around the globe, contributing to human suffering and leading to disagreements between Member States. With the recent launch of the European Defence Fund, the EU will massively subsidise research and development of military technology between Member States which might trigger even more expansive arms exports policies. Enhanced cooperation between the Member States and on the EU level in arms production must bring with it coherent application of common rules on the export of arms.

We, therefore, propose an EU Regulation that introduces a Union regime for the export control of arms that maintains the final decision on exports at the national level but institutionalizes pre-decision risk assessment, monitoring and end-user control at EU level.

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## 2. Legal Basis

It has been argued that regulating the arms trade finds its legal basis in the Common Foreign and Security Policy (Article 21 Treaty on European Union), just as the Common Position does, because arms export policies pursue objectives linked to the Member States foreign and security policy. Specifically, it has been argued that Article 346 of the Treaty on the Functioning of the European Union (TFEU) makes it impossible to put forward EU legislation. We oppose this view, as Article 346 TFEU only states that the Member States can make exemptions to Union rules whenever national security interests require them to do so.

We argue that regulating arms export should find its legal basis within the Common Commercial Policy (Article 207 TFEU) as the Court of Justice of the EU (CJEU) has, through long-standing case law, established a broad understanding of 'goods'. The intrinsic nature of military products does not stand in the way of understanding them as 'goods' for the purpose of the TFEU. Furthermore, regulating and harmonizing exports is the core aim of the Common Commercial Policy. This argument is strengthened by the fact that the Dual-Use Regulation, the Regulation on the export of goods that can be used for torture and the Regulation on illicit trafficking of firearms have all been adopted with the Common Commercial Policy (CCP) as their legal basis despite similar links to the Common Foreign and Security Policy (CFSP). Furthermore, the Council recognised that arms exports fall partially within the scope of the CCP when the ATT was negotiated, signed and ratified by the Member States in 2014.

## 3. The proposal in short

### Common risk assessments

The regulation does not aim for an EU-level decision-making over (roughly 30.000 decisions in 2020 in the EU) national arms export licences issued in the Member States. It will not infringe the delimitation of competencies between the Union and the Member States, as the final decision about export licenses will remain with the Member States. In very specific cases, a Member State could request an exemption if it can demonstrate that national security interests are at stake. However, in order to increase the political coherence of export decisions across the EU, prevent disagreements between the Member States, and ensure adequate implementation of the export criteria, an independent Common Risk Assessment Body will be established. It identifies and continuously updates a list of countries, to which arms exports could be problematic (according to the common criteria) that will be presented by the Commission as a delegated act to the European Parliament and the Council and both can demand modifications. For the countries listed in the delegated act, the risk assessment body will develop a detailed risk assessment according to military list categories.

In case a company in the EU requests an export licence to a country listed as problematic by the Common Risk Assessment Body, the national licensing authority in the relevant Member State needs to incorporate the recommendations of the Common Risk Assessment Body into its decision-making process. In case the respective Member State's assessment of an arms export application is more restrictive than that of the Common Risk Assessment Body, the decision of the Member State prevails. In case a Member State decides to export certain arms to a destination contrary to the Common Risk Assessment Body's recommendation, it must produce a written justification of its decision. This justification must be based on national security interests and must be transmitted to the to-be-established Arms Export Coordination Group and the relevant specialised committee of the European Parliament.

### Transparency

The work of the Common Risk Assessment Body is supported by an Open Source Intelligence Unit at EU level that will gather relevant publicly available information, act as an interface for the public (in particular, civil society organizations) and produce public reports that will be taken into account by the risk assessment body.

### Accountability

The EU regulation makes the respect for the export criteria legally enforceable, as it provides a legal avenue to the CJEU, including in cases where a Member State justifies arms exports on questionable national security grounds. In addition, the regulation provides ways to sanction Member States acting contrary to the provisions of the regulation by denying them access to European Defence Fund subsidies or other EU funds in the defence sector.

Whilst the responsibility of Member States on arms export licensing decisions will remain the focus of the draft regulation, it will also refer to arms-producing companies, obliging them to exert due diligence to exports before applying for an export licence. Specifically, arms-producing companies will need to assess whether potential recipients of the military technology fulfil the EU common criteria.

### Improved criteria from the Common Position

An additional part of this regulation updates the Common Position's eight criteria to the current international legal framework of the ATT. We suggest introducing the criterion of a risk to increase gender-based violence

with a respective export, as well as an assessment of the corruption possibly linked to an export, or a subsequent diversion in the assessment of the Common Risk Assessment Body.

#### 4. A detailed explanation of the specific provisions of the proposal

##### The subject of the regulation

- 'Arms' are defined in Article 2(1) as goods and items, including software, services and technology, which can be used for military purposes, and which are listed in the Common Military List of the European Union.

Article 3(1) stipulates that an authorisation is required for the export of all items, services, and technologies, which can be used for military purposes. 'Export' includes brokering, transit and re-export of military items, services, and technologies.

##### National licensing decisions

- Article 3(2) and 3(3) states that the decision to issue an export license lies with the Member State. In this respect, there is no change to the existing division of competencies between the EU and the Member States. Article 3(4) stipulates that the Member States must reassess already issued export licenses whenever new relevant information becomes available.

##### Additional risk assessment criteria

- Article 4 transposes the eight risk assessment criteria found in Article 2 of the Common Position. They are to be used by national licensing authorities for licences requests and by the Common Risk Assessment Body when evaluating risks regarding third countries. Furthermore, the risk of military equipment or technology to commit or facilitate acts of gender-based violence or serious acts of violence against women and children is added to the criterion. Finally, an additional criterion is introduced, as criterion nine, that focuses on the risk of corrupt practices.

##### A Common Risk Assessment Body

- Article 9 introduces a common risk assessment for potential third-country destinations based on the criteria defined in Article 4. Pursuant to Article 10, the Commission sets up this Common Risk Assessment Body at EU level and tasks it to carry out the risk assessments for each Military List category for third countries where arms exports could potentially violate any of the nine criteria. Article 11 describes how experts are appointed to the Common Risk Assessment Body. The experts shall come from as a broad range of Member States as possible and be appointed because of their expertise. To ensure the independence of the Common Risk Assessment Body, the Commission should, when appointing experts, aim for a balanced composition of experts in terms of variety of skills, experience, and knowledge. In addition, the composition should respect the principle of gender parity.

##### One list of third country destinations

- Following Article 9, the Commission, relying on the common risk assessment, establishes a list of destination countries where there is a risk of violating one or more of the nine criteria. The lists are established and amended via delegated acts pursuant to Article 17.

Stricter national interpretation of the nine criteria is allowed.

- Article 5(1) states that this Regulation is without prejudice to the possibility to enact or uphold stricter export control regimes in the Member States. The Regulation thus only establishes minimum common rules and implements them via the Common Risk Assessment Body and a lists of third countries. In addition, Article 5(2) explicitly points out that no right of export for arms manufacturers can be derived from this Regulation.

#### Derogation from the common risk assessment is possible on the grounds of national security

- In case a Member State decides to grant an export licence to a destination that the Common Risk Assessment Body has placed on the list Article 8(3) states that the Member State must present a written argument that describes the national security interest which the Member State, in line with Article 346 TFEU, relies on. In such a case, the relevant body of the European Parliament shall receive a copy of this written argument for further consideration.

#### Indirect sanctions for cases of non-compliance

- Following the issue of an export licence to a listed destination, Article 13(2) empowers the Commission to exclude companies from military funding of the EU, like for example the European Defence Fund provided the Member State fails to issue a written argument on its security interests.

#### Annual reports of national exports

- Article 18 obliges the Member States to provide data annually on the number and value of granted export licences to each destination country broken down by Military List categories, and on the value of actual exports to each destination country also broken down by Military List category. The Commission shall publish an annual report with this data from all Member States in a searchable online database. Additionally, each Member State is obliged to publish a national report on its exports of arms. The content of this report shall be in accordance with national legislation. Whereas the 2008 Common Position already stipulated that the Commission and the Member States publish annual reports, this would become obligatory and in a harmonized manner with regards to how the data is structured with the aim of enhanced comparability.

#### Initiating and fostering public debates and knowledge

- Article 18(5) introduces an Intelligence Unit that shall be set up by the Commission and External Action Service (EEAS) to generate a basis for a broad and informed exchange between relevant stakeholders such as the European Parliament, exporters, and civil society organisations. The Intelligence Unit shall publish analyses and recommendations based on open source information that will be publicly available.

#### Due diligence obligations for exporters

- Pursuant to Article 14(1), exporters of arms are obliged to exert due diligence to exports before applying for an export licence. This is a well-established policy in the context of the dual use export

regime and other frameworks and requires, inter alia, the setting up of internal compliance programs in relevant companies.

#### Post-shipment control as a joint task for the Member States and the Union

- Article 11(5) stipulates that the Commission together with the Member States, the EEAS and EU Delegations, shall set up a post-shipment control system for arms exports to countries on the list.

### 5. Additional initiatives and points of interest

Some measures and initiatives should strengthen the legal framework for export controls of arms, but for legal reasons did not find their way into the Draft Regulation.

#### Annual debate in the European Parliament about arms exports

- Following the publication of the Commission's annual report on arms exports, as detailed in Article 18, the European Parliament should hold a debate on the topic to increase transparency, democratic control and public awareness of the issue of arms exports.

#### Public justification hearing in the European Parliament

- In case a Member State issues an arms export license to a country to which the risk assessment body recommended the licence be denied, that respective country's competent authority should have to justify the decision in the European Parliament.

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